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The Hague Convention: A Medium for International Discovery

Tony Abdollahi

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The Hague Convention: A Medium for International Discovery

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The Hague Convention: A Medium For International Discovery

Tony Abdollahi[†]

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I. Introduction

Globalization has resulted in more international litigation,¹

[†] Tony Abdollahi is a graduate of University of California Berkeley Boalt Hall School of Law and practices commercial litigation with Watson Law Group.

¹ Tsai-Yi Yang v. Fu-Chiang Tsui, 499 F.3d 259, 280 (3d Cir. 2007) (“Globalization has lead to a dramatic increase in litigation of international . . . disputes.”); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1134, 1157 n.12 (C.D. Cal. 2005) (recognizing “an unprecedented expansion of transnational activities and a resulting increase in international business disputes”); Agfa-Gevaert, A.G. v. A.B. Dick Co., 879 F.2d 1518, 1526 (7th Cir. 1989) (noting an “increase in international commercial litigation”).

which in turn has led to an increasing number of international discovery disputes.² This phenomenon has been decades in the making and, in the early 1970s, a group of nations established a framework for conducting international discovery.³ As a result of their efforts, discovery from a foreign tribunal may proceed under the Hague Convention ("the Convention").⁴

The years since its adoption have clarified the scope of the Convention, and a number of principles have emerged. As discussed in Part II of this article, discovery under the Convention is based on a mutual respect as between the laws of the participating nations—i.e., "comity." Accordingly, a discovery request emanating from a foreign tribunal must be compatible with the laws of both the propounding *and* host country.⁵ Moreover, Part VI shows that a foreign tribunal is vested with the authority to determine whether, and the extent to which, discovery from the propounding nation is permissible under the former's own laws.⁶

As Part III explains, the Convention is an *alternative* procedure, such that an American litigant's initial recourse is normally under the Federal Rules of Civil Procedure ("F.R.C.P." or "Federal Rules"). The party seeking to invoke the Convention has the burden of demonstrating that the Convention is superior—e.g., more effective or offers greater protection—to the Federal Rules.⁷ As discussed in Part VIII, to the extent that an American court has *in personam* jurisdiction, the foreign witness may be examined in the host country pursuant to a noticed deposition

² See, e.g., *Lantheus Medical Imaging, Inc. v. Zurich American Ins. Co.*, 841 F. Supp. 2d 769, 795 (S.D.N.Y. 2012) (acknowledging that "[plaintiff] may well be correct that transnational discovery requests are increasing due to the global nature of international commerce . . .").

³ See *Estate of Klieman v. Palestinian Authority*, 272 F.R.D. 253, 255 (D.D.C. 2011) ("On March 18, 1970, seventeen nations . . . entered into the Hague Convention.").

⁴ See *Bodner v. Paribas*, 202 F.R.D. 370, 372 n.1 (E.D.N.Y. 2000) ("The Hague Convention is the popular name for the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature, Mar. 18, 1970 . . . 23 U.S.T. 2555, T.I.A.S. No. 7444 (codified at 28 U.S.C. §1781).").

⁵ As used in this article, "host country" or "host nation" refers to the nation *from which* discovery is sought.

⁶ See *Tulip Computers Int'l B.V. v. Dell Computer Corp.*, 254 F. Supp. 2d 469, 472 (D. Del. 2003); *In re Baycol Prod. Litig.*, 348 F. Supp. 2d 1058, 1058 (D. Minn. 2004).

⁷ See *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 (1987).

under F.R.C.P. Rule 28(b).⁸ On the other hand, when a foreign witness does not fall within the jurisdiction of an American court, discovery usually proceeds under the Convention.⁹

Unlike the comparative predictability of the Federal Rules, discovery under the Convention is often expensive and may yield uncertain results. Part IV explains that a discovery request under the Convention is subject to the multiple-part test established by the Supreme Court in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*,¹⁰ wherein the propounding party must demonstrate the importance of the evidence, the place of its origination, disprove “alternative means” of obtaining the information, and show that “noncompliance with the request would undermine important interests of the United States.”¹¹ But, as described in Part V, even if a discovery request complies with *Aerospatiale*, it is subject to the privileges, restrictions, and relevancy limits of the host nation.

Accordingly, Part VII demonstrates that while the Convention provides a channel for discovery in circumstances where it would otherwise be unavailable—e.g., where an American court lacks jurisdiction over a foreign witness—comity ensures that the host nation from which discovery is sought obtains the protections of its own laws and as well as the laws of the propounding nation.

II. The Hague Convention is Predicated on “Comity” and Brings a Uniform Standard for Undertaking Discovery Among Participating Nations.

The Hague Convention is the culmination of years of negotiations between participating nations with the intent of achieving a level of uniformity regarding international discovery.¹² The difficulty in reaching an agreement arose, in large part, because different nations have different rules regarding discovery (e.g., civil versus common law countries), such that one nation may take issue with a request propounded from a foreign

⁸ See *id.* at 553 n.4.

⁹ See *id.* at 540-41.

¹⁰ *Aerospatiale*, 482 U.S. 522.

¹¹ *Id.* at 544 n.28.

¹² *Laker Airways Ltd. v. Pan Am. World Airways*, 103 F.R.D. 42, 49 (D.D.C. 1984) (“The goal of the Hague Convention was to facilitate and increase the exchange of information between nations.”).

jurisdiction that is inconsistent with the former's discovery rules.¹³ The principle of comity—wherein each participating nation accords respect to the discovery laws of the other—was key to implementing the Convention.¹⁴

Despite the challenge presented by attempting to reconcile different systems of discovery, the increase in foreign trade—and ensuing litigation—compelled a cooperative effort to establish a framework for conducting foreign discovery:

The substantial increase in litigation with foreign aspects arising, in part, from the unparalleled expansion of international trade and travel in recent decades had intensified the need for an effective international agreement to set up a model system to bridge differences between the common law and civil law approaches to the taking of evidence abroad.¹⁵

Thus,

[t]he Hague Evidence Convention grew out of an effort over several decades to promote cooperation in the development of uniform rules of private international law . . . the Convention represented a “substantial breakthrough” that was to provide “a bridge between civil law and common law practices for international judicial assistance in the taking of evidence abroad.”¹⁶

From the perspective of an American litigant, the Convention reflects that it is not always possible to bring a foreign witness within the jurisdiction of an American court.¹⁷

Against this backdrop, the Hague Convention, which became

¹³ See *Philadelphia Gear Corp. v. Am. Pfauter Corp.*, 100 F.R.D. 58, 59 (E.D. Pa. 1983) (“The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters is a multilateral treaty that was designed to provide a uniform procedure to be used in obtaining evidence in foreign countries. A central purpose of the convention was to reconcile the markedly different discovery procedures that exist in common law countries, such as the United States, and civil law countries, such as West Germany.”).

¹⁴ See *id.*

¹⁵ *Husa v. Labs. Servier SA*, 740 A.2d 1092, 1096 (N.J. 1999).

¹⁶ *S & S Screw Mach. Co. v. Cosa Corp.*, 647 F. Supp. 600, 612 (M.D. Tenn. 1986) (internal citations omitted).

¹⁷ See *DiFederico v. Marriott Int'l, Inc.* 714 F.3d 796, 807 (4th Cir. 2013) (“In an era of increasing international commerce, parties who choose to engage in international transactions should know that when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum . . .”) (quoting *Mizokami Bros. v. Baychem Corp.*, 556 F.2d 975, 978 (9th Cir. 1977)).

effective in 1972 and is codified under 28 U.S.C. §1781, allows discovery via a Letter of Request:

Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.¹⁸

Articles 11 and 21 provide that, *inter alia*, a foreign tribunal may guard against discovery that is privileged, incompatible with, or prohibited by the laws of the propounding or host nation:

Article 11

In the execution of a Letter of Request the person concerned *may refuse to give evidence in so far as he has a privilege or duty* to refuse to give the evidence—

- (a) under the law of the State of execution; or
- (b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.¹⁹

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.²⁰

* * *

Article 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence –

- (a) he may take all kinds of evidence which are *not incompatible with the law of the State where the evidence is taken* or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

¹⁸ The term “Letter of Request” is interchangeable with “Letter Rogatory.” *In re Urethane Antitrust Litigation*, 267 F.R.D. 361, 363 n.7 (D. Kan. 2010) (“In 1993, the term ‘letter of request’ was substituted in the rule for the term ‘letter rogatory’ ‘because it is the primary method provided by the Hague Convention. A letter rogatory is essentially a form of letter of request.’”).

¹⁹ Judiciary and Judicial Procedure, 28 U.S.C. § 1781 (1972).

²⁰ *Id.* (emphasis added).

....

(d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is *not forbidden by the law of the State where the evidence is taken*;

(e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.²¹

As reflected by Articles 11 and 21, discovery under the Convention must respect the "integrity" of the participating nations.²² Under the former, discovery pursuant to a Letter of Request is subject to the privileges and duties of both the propounding and the host nation. Under the latter, discovery must be compatible with—and permitted under—the laws of the host nation from which discovery is sought.²³

Fifteen years after the Convention's adoption, the U.S. Supreme Court, in its seminal decision *Aerospatiale*, declined to adopt specific rules for discovery propounded under the Convention and instead emphasized that—due to comity, expense, and the potential for ulterior motives—American courts must exercise caution in evaluating foreign discovery:

American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses. For example, the additional cost of transportation of documents or witnesses to or from foreign locations may increase the danger that

²¹ Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, art. 21 [hereinafter Hague Evidence Convention] (emphasis added).

²² See *Work v. Bier*, 106 F.R.D. 45, 48 (D.D.C. 1985) ("[W]here [discovery] of party witnesses are sought to be taken within the geographic boundaries of a State which is a party to the Hague Evidence Convention, such discovery must be in accord with the procedures required by that Convention, in order to protect the territorial sovereignty of that Nation.").

²³ Hague Evidence Convention, *supra* note 21, art. 21.

discovery may be sought for the improper purpose of motivating settlement, rather than finding relevant and probative evidence. Objections to “abusive” discovery that foreign litigants advance should therefore receive the most careful consideration. In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state. We do not articulate specific rules to guide this delicate task of adjudication.²⁴

While the Supreme Court declined to adopt “specific” rules, the principle of “comity” remains a guiding force under the Convention.

International comity is the recognition that one nation accords within its territory to the otherwise nonbinding laws of another nation, having due regard both for international cooperation and for the rights of those who seek the protection of the domestic laws. Comity is ‘neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other.’²⁵

With respect to the United States’ participation, one difficulty in implementing the Convention was that American courts typically vest litigants with broader discovery rights than their foreign counterparts:

Great differences exist, however, between the American approach that places discovery largely in the hands of the parties with minimal court supervision before trial, and the traditional civil law approach that regards gathering of evidence as an exercise of judicial sovereignty entrusted largely to the court and often delayed until the trial itself. These differences led sometimes to impasses between U.S. courts and foreign governments, and frequently to the result that evidence secured abroad via unfamiliar procedures was either inadmissible or otherwise useless in the requesting court. *The Hague Evidence Convention was designed to bridge these procedural obstacles by providing a means of securing evidence abroad that would be*

²⁴ *Aerospatiale*, 482 U.S. at 546. (emphasis added) (citation omitted).

²⁵ *S & S Screw Mach. Co. v. Cosa Corp.*, 647 F. Supp. 600, 615 (M.D. Tenn. 1986) (citing *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)).

*"tolerable" in the executing state while at the same time "utilizable" in the requesting forum.*²⁶

In this regard, the Federal Rules of Civil Procedure try to protect against asymmetric discovery by providing foreign entities the same protections against improper discovery that are afforded to American litigants.²⁷

Thus, as a compromise between many nations, it may be said that the Hague Convention exists because it is easier to conduct discovery with it than without it. The increase in international trade and ensuing litigation speak to this, as the Convention has played a role in addressing disputes arising from distinct discovery rules from different nations.²⁸ Discovery under the Convention therefore reflects—and attempts to assuage—the concerns that preceded its adoption, *viz.* a request from the propounding jurisdiction may not be compatible with the laws of the nation from which evidence is sought.²⁹ For this reason, discovery under the Convention is guided by comity, such that its scope is *ultimately* determined by the laws of the nation from which discovery is sought, as interpreted by its own courts.³⁰

III. The Hague Convention is an Alternative Procedure and the Burden is on the Moving Party to Demonstrate that The Federal Rules Are Inadequate.

The Hague Convention is an alternative method of discovery vis-a-vis the F.R.C.P., such that discovery should initially proceed under the F.R.C.P. unless they somehow prove inadequate. The judicial "preference" for the F.R.C.P. is in part due to the fact that discovery under the Convention, which often requires court supervision, is slower and more costly.³¹ The party seeking to

²⁶ *Id.* at 612 (emphasis added) (citation omitted).

²⁷ See *Ethypharm S.A. France v. Abbott Laboratories*, 748 F. Supp. 2d 354, 359 (D. Del. 2010) ("Rule 28(b), authorizing foreign discovery 'must be read together with Rule 26(c), which permits a court to make any order 'which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" (internal quotations omitted)).

²⁸ See *Philadelphia Gear*, 100 F.R.D. at 59.

²⁹ See Hague Evidence Convention, *supra*, note 21, art. 11.

³⁰ See *id.* art. 21.

³¹ *International Society for Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. 435, 450 (S.D.N.Y. 1984); see also *Murphy v. Reifenhauer KG Maschinenfabrik*, 101 F.R.D. 360, 361 (D. Vt. 1984).

invoke the Convention therefore bears the “burden of persuasion,” and a court evaluating discovery under the Convention must give equal consideration to the discovery procedures available under the Federal Rules.³² Courts must weigh the applicability of the Convention on a case-by-case basis and may decline to invoke the Convention if discovery under the Federal Rules is adequate or if discovery under the Convention is impractical.³³

As an initial matter, the Convention is inapplicable where an American court has jurisdiction over the litigant—i.e., a party to the action.³⁴ Thus, the Convention does not displace an American court’s jurisdiction over a foreign litigant.³⁵

The Hague Convention is a permissive discovery procedure whereby—subject to the rules and privileges of the participating countries—a court in one signatory nation may request that another signatory nation provide evidence in a manner “customary” with the rules of the latter:

The Hague Evidence Convention serves as *an alternative or “permissive” route* to the federal Rules of Civil Procedure for the taking of evidence abroad from litigants and third parties alike. The Convention allows judicial authorities in one signatory country to obtain evidence located in another signatory country “for use in judicial proceedings, commenced or contemplated” . . . [u]pon receipt of a Letter of Request, which must provide specific information regarding the lawsuit and the information sought to be discovered, the signatory state “shall [then] apply the appropriate measure of compulsion” as is *customary “for the execution of orders issued by the authorities*

³² See *Pronova BioPharma Norge AS v. Teva Pharmaceuticals USA, Inc.*, 708 F. Supp. 2d 450, 452 (D. Del. 2010).

³³ See *In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288, 305 (3d Cir. 2004).

³⁴ *Daimler-Benz Aktiengesellschaft v. U.S. Dist. Court for Western Dist. of Oklahoma*, 805 F.2d 340, 341 (10th Cir. 1986) (“[T]he Fifth Circuit held that ‘[t]he Hague Convention has no application at all to the production of evidence in this country by a party subject to the jurisdiction of a district court pursuant to the Federal Rules.’”); *Lowrance v. Michael Weinig, GmbH and Co.*, 107 F.R.D. 386, 388-89 (D.C. Tenn. 1985) (“[T]he Hague Convention does not apply to discovery efforts in this country directed to a foreign national party over whom the court has in personam jurisdiction.”).

³⁵ *Belmont Textile Machinery Co. v. Superba, S.A.*, 48 F. Supp. 2d 521, 524 (W.D.N.C. 1999) (“[T]he Hague Convention does not deprive a district court of jurisdiction to order a foreign national party before it to produce evidence under the Federal Rules of Civil Procedure.”).

of its own country." Individuals to whom a Letter of Request is directed have the *right to refuse to give evidence to the extent they are protected by a privilege under either the law of the State of execution or the State of origin.*³⁶

Thus, as opposed to the "alternative" Hague Convention, the applicable rules of discovery—e.g., the F.R.C.P.—are deemed "normal":

The Hague Convention "prescribes certain procedures by which a judicial authority in one contracting nation may request evidence located in another nation." The Convention is not mandatory and serves only as a permissive supplement to the Federal Rules of Civil Procedure. When discovery is sought from a foreign party, there is no rule of "first resort," compelling the discovering party to attempt to utilize the Convention's procedures before resorting to the Federal Rules. As such, *the Federal Rules remain the "normal method[] for federal litigation involving foreign national parties"* unless the facts of a given case indicate "the 'optional' or 'supplemental' Convention procedures prove to be conducive to discovery."³⁷

In acknowledging that the Convention is an alternative procedure, *Schindler* relied on the holding in *Aerospatiale* that "the text of the Evidence Convention, as well as the history of its proposal and ratification by the United States, unambiguously supports the conclusion that it was intended to establish *optional* procedures that would facilitate the taking of evidence abroad."³⁸

Observing that interrogatories and requests for production are commonly used in international litigation, the *Aerospatiale* court noted that designating the Convention as the exclusive procedure would (unnecessarily) entail court supervision for "routine" discovery:

An interpretation of the Hague Convention as the exclusive means for obtaining evidence located abroad would effectively subject every American court hearing a case involving a national of a contracting state to the internal laws of that state. Interrogatories and document requests are staples of international commercial litigation, no less than of other suits,

³⁶ *Pronova BioPharma*, 708 F. Supp. 2d at 452 (emphasis added).

³⁷ *Schindler Elevator Corp. v. Otis Elevator Co.*, 657 F. Supp. 2d 525, 528-29 (D.N.J. 2009) (emphasis added).

³⁸ *Aerospatiale*, 482 U.S. at 538 (emphasis added).

yet a rule of exclusivity would *subordinate the court's supervision of even the most routine of these pretrial proceedings* to the actions or, equally, to the inactions of foreign judicial authorities.³⁹

The Supreme Court thus observed that the Convention is merely one procedure for obtaining discovery from foreign witnesses:

[I]t appears clear to us that the optional Convention procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention. Although these procedures are not mandatory, the Hague Convention does "apply" to the production of evidence in a litigant's possession in the sense that it is one method of seeking evidence that a court may elect to employ.⁴⁰

Citing an interest in speedy and inexpensive litigation, while noting delay and expense as drawbacks, the Court rejected the proposition that the Convention is the primary or default discovery procedure regarding foreign witnesses:

[W]e cannot accept petitioners' invitation to announce a new rule of law that would require first resort to Convention procedures whenever discovery is sought from a foreign litigant. Assuming, without deciding, that we have the lawmaking power to do so, we are convinced that such a general rule would be unwise. In many situations *the Letter of Request procedure authorized by the Convention would be unduly time consuming and expensive*, as well as less certain to produce needed evidence than direct use of the Federal Rules. *A rule of first resort in all cases would therefore be inconsistent with the overriding interest in the "just, speedy, and inexpensive determination" of litigation in our courts.*⁴¹

For these reasons, before resorting to the Convention, a court must examine the facts and the reasonableness of available discovery procedures— e.g., the F.R.C.P. — on a case-by-case basis:

We therefore decline to hold as a blanket matter that comity requires resort to Hague Evidence Convention procedures without prior scrutiny in each case of the particular facts,

³⁹ *Id.* at 539 (emphasis added).

⁴⁰ *Id.* at 541.

⁴¹ *Id.* at 542-43 (emphasis added).

sovereign interests, and likelihood that resort to those procedures will prove effective . . . [t]he exact line between reasonableness and unreasonableness in each case must be drawn by the trial court, based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke.⁴²

Adjunct to the case-by-case approach adopted by the Supreme Court is the principle that the proponent of its use must demonstrate that the Hague Convention is a superior to the Federal Rules for obtaining discovery in a particular case. In this regard, the intermediate federal courts, citing *Aerospatiale*, hold that the burden of demonstrating the applicability of the Convention—while not onerous—is on the party seeking discovery (or protection) thereunder:

“A party which seeks the application of the Hague [Evidence] Convention procedures rather than the Federal Rules [of Civil Procedure] *bears the burden of persuading the trial court[]*’ of the necessity of proceeding pursuant to the Hague Evidence Convention.” “That burden is not great, however, since the ‘Convention procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention.’”⁴³

In this regard, the *Aerospatiale* factors considered in invoking the Convention have been reduced to just three—(i) facts of a particular case, (ii) sovereign interests, and (iii) potential effectiveness:

In order to compel application of the Hague Convention over the Federal Rules, the party seeking to apply the Convention procedures bears the burden to show that the “particular facts, sovereign interests, and likelihood [of resorting to Hague procedures] will prove effective.” In evaluating whether to require resort to the Convention, courts should be mindful of “unnecessary, or unduly burdensome, discovery” that may place foreign litigants in a disadvantageous position.⁴⁴

⁴² *Id.* at 544, 546 (emphasis added, internal citations omitted).

⁴³ *Pronova BioPharma*, 708 F. Supp. 2d at 452-53 (emphasis added); *see also* *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 435 (E.D.N.Y. 2008) (“[A] party seeking the application of the Hague Convention procedures, rather than the Federal Rules of Civil Procedure, bears the burden of persuasion.”).

⁴⁴ *Schindler Elevator Corp. v. Otis Elevator Co.*, 657 F. Supp. 2d 525, 528-29 (D.N.J. 2009); *see also In re Aircrash Disaster Near Roselawn, Ind.* Oct. 31, 1994, 172

Thus, an American litigant should initially look to the Federal Rules for international discovery and may resort to the Hague Convention only if the litigant demonstrates that the latter is superior based on the circumstances presented by a particular case. The initial preference for the Federal Rules is due to a variety of factors—cost, delay, the potential need for court supervision, etc.—that the proponent of the Convention must allay before discovery may proceed thereunder.⁴⁵

Indeed, certain kinds of written discovery available under the Federal Rules, such as interrogatories and requests for production, may not be available in the foreign jurisdiction, thereby making the F.R.C.P. preferable.⁴⁶ Furthermore, while the Federal Rules are a “known quantity” to American litigants, discovery under the Convention is subject to the laws of the host country as interpreted by its own courts.⁴⁷ Accordingly, any issues that arise in the course of discovery under the Convention may require an American litigant to incur the costs of learning and effectuating the laws of the foreign tribunal. The potential time and expense associated with the foregoing may, in practice, make the Federal Rules preferable to the Convention.

However, in the event that the Federal Rules will not allow the desired discovery, and a litigant is willing to absorb the time and cost, the Convention is available to obtain evidence from a foreign jurisdiction.

F.R.D. 295, 309 (N.D. Ill. 1997) (“*Aerospatiale* has been interpreted by lower courts to contain a three-part test in determining whether ‘to use the Hague Convention procedures in favor of the Federal Rules of Civil Procedure. In determining which methods of discovery to use, courts should consider: (1) the intrusiveness of the discovery requests given the facts of the particular case, (2) the Sovereign interests involved and, (3) the likelihood that resort to the Convention would be an effective discovery device.’”); see also *Valois of America, Inc. v. Risdon Corp.*, 183 F.R.D. 344, 346 (D. Conn. 1997) (noting the “‘three-pronged inquiry’ set forth in *Aerospatiale*, namely (1) the examination of the particular facts of the case, particularly with regard to the nature of the discovery requested; (2) the sovereign interests in issue; and (3) the likelihood that the Hague Convention procedures will prove effective.”).

⁴⁵ *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 542-43 (1987).

⁴⁶ *Id.* at 539; see also *In re Aircrash Disaster Near Roselawn, Ind.*, 172 F.R.D. at 310-11.

⁴⁷ *Tulip Computers*, 254 F. Supp. 2d at 472; *In re Baycol*, 348 F. Supp. 2d at 1058; see also *Aerospatiale*, 482 U.S. at 567.

IV. Discovery Under The Hague Convention is Evaluated by Factors Set Forth by The Supreme Court.

The "reasonableness" of a request determines whether, and the extent to which, discovery is permitted under the Convention.⁴⁸ However, the scope of discovery in the United States is often broader than in foreign jurisdictions.⁴⁹ In this regard, the Supreme Court in *Aerospatiale* set out several factors to gauge whether discovery may proceed under the Convention: (1) the importance of the documents, (2) the specificity of the request, (3) whether the information originated in the United States, (4) the availability of alternate means of discovery, and (5) whether compliance with the request undermines or enhances the interests of the United States and the host nation, respectively.⁵⁰ Moreover, the Convention may also be used as a shield against discovery, such that a party from whom discovery is sought may attempt to avoid providing responses pursuant to the laws of either the propounding or, more saliently, the host nation.⁵¹

Where the Hague Convention is invoked, a Letter of Request must specifically set forth the information sought (or judicial act to be performed) and the propounding party may be called upon to provide information necessary to effectuate the discovery request:

Under the Hague Convention, a letter of request must specify "the evidence to be obtained or other judicial act to be performed," Art. 3, and must be in the language of the executing authority or be accompanied by a translation into that language. Art. 4, 23 U.S.T., at 2558-2559, T.I.A.S. 7444. Although the discovery request must be specific, the party seeking discovery may find it difficult or impossible to determine in advance what evidence is within the control of the party urging resort to the Convention and which parts of that evidence may qualify for international judicial assistance under the Convention. This information, however, is presumably within the control of the producing party from which discovery is sought. The district court may therefore require, in appropriate situations, that this party bear the burden of providing translations and detailed

⁴⁸ See *Aerospatiale*, 482 U.S. at 546.

⁴⁹ *Id.* at 542 ("It is well known that the scope of American discovery is often significantly broader than is permitted in other jurisdictions.").

⁵⁰ *Id.* at 544, n.28.

⁵¹ *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 355 (D. Conn. 1991).

descriptions of relevant documents that are needed to assure prompt and complete production pursuant to the terms of the Convention.⁵²

A court may consider the following factors in deciding whether the Convention is applicable:

(1) the importance of the documents to the litigation; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternate means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.⁵³

On the heels of *Aerospatiale*, in *In re Anschuetz & Co., GmbH*,⁵⁴ the Fifth Circuit confirmed that—in determining the scope of discovery—an American court must consider the reasonableness of the requests and the interests of the host nation:

[A]s the Supreme Court noted, [] sensitive interests of sovereign powers are involved and [] it would be a serious mistake for the district court not to respect properly such interests in the course of deciding the appropriate discovery techniques to be applied. *In weighing the respective rights of the parties before it, and in determining the need for granting discovery requests, the “exact line between reasonableness and unreasonableness” is clearly a matter for the trial court.*⁵⁵

The court observed that many countries do not subscribe to the broad scope of discovery available in the United States, citing Germany’s restrictions on business information as an example:

[W]e emphasize that it is most important that the district court should consider, with due caution, that many foreign countries, particularly civil law countries, *do not subscribe to our open-ended views regarding pretrial discovery*, and in some cases may even be offended by our pretrial procedures. *The purpose of the Hague Convention is to strike a compromise among different systems of laws* in order to facilitate the administration of justice

⁵² *Id.* at 546 n.30.

⁵³ *In re Baycol Prod. Litig.*, 348 F. Supp. 2d 1058, 1059 (D. Minn. 2004) (citing *Aerospatiale*, 482 U.S. at 544 n.28).

⁵⁴ 838 F.2d 1362, 1364 (5th Cir. 1988).

⁵⁵ *Id.* at 1364 (emphasis added).

without creating unnecessary friction among the foreign entities involved. One example of such a consideration, offered for illustrative purposes only, is the constitutional principle of proportionality in the Federal Republic of Germany, "pursuant to which a judge must protect personal privacy, commercial property, and business secrets."⁵⁶

Thus, discovery that is not consonant with the Convention—e.g., privileged in the propounding or host country, burdensome, etc.—cannot be compelled from a foreign litigant.⁵⁷

Moreover, an American court may decline to invoke the Hague Convention where the moving party fails to demonstrate that it is a superior procedure to the Federal Rules. In *First American Corp. v. Price Waterhouse LLP*,⁵⁸ the plaintiff filed suit after the collapse of a bank and sought discovery from a United Kingdom accounting partnership. The defendant objected on confidentiality grounds and argued that "[the plaintiff] should be compelled to resort first to the Hague Convention."⁵⁹ The court observed that the Convention is not the exclusive means of obtaining international discovery and that an American court's choice must be guided by international comity:

The Hague Convention is not the exclusive means for obtaining discovery from a foreign entity The Supreme Court in *Aérospatiale* declined to announce any fixed rule on this subject, at the same time suggesting that concerns of international comity require that "American courts . . . take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign

⁵⁶ *Id.* (emphasis added); see also *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 441 (E.D.N.Y. 2008) ("Because the scope of civil discovery in the United States is broader than that of many foreign jurisdictions, some courts have applied a more stringent test of relevancy when applying the Federal Rules to foreign discovery.").

⁵⁷ *In re Urethane Antitrust Litigation*, 267 F.R.D. 361, 364 n.12 (D. Kan. 2010) ("Article 11 of the Hague Convention permits a person being questioned 'to refuse to give evidence insofar as he has a privilege or a duty to refuse to give the evidence' under the law of either the state of origin (i.e., the United States) or the state of execution (i.e., Germany).") (parenthesis in original); *Valois*, 183 F.R.D. at 349 ("If [the propounding party] continues to insist upon burdensome and intrusive discovery from [the responding party], then resort to the Hague Convention procedures ultimately may be appropriate.").

⁵⁸ 154 F.3d 16 (2d Cir. 1998).

⁵⁹ *Id.* at 17.

state.”⁶⁰

The court noted that the defendant failed to show any conflict between American law and United Kingdom law regarding confidentiality protection:

[The defendant] does not show that there is a collision here between the U.K. confidentiality laws and the federal discovery procedures, or that the U.S. courts would be infringing the prerogative of a British court to interpret the U.K. laws in the first instance—two factors that we believe heavily influenced courts that have restricted discovery in the way [the defendant] urges.⁶¹

Citing several of the *Aerospatiale* factors, the Second Circuit held that—rather than forcing the plaintiff to proceed under the Convention—discovery was properly enforced by a subpoena under the Federal Rules:

The district court here has done what comity requires in this case. The court identified four factors deemed relevant . . . for gauging the reasonableness of foreign discovery: (i) the competing interests of the nations whose laws are in conflict; (ii) the hardship that compliance would impose on the party or witness from whom discovery is sought; (iii) the importance to the litigation of the information and documents requested; and (iv) the good faith of the party resisting discovery. The district court found that principles of comity weighed in favor of enforcement of the subpoena.⁶²

Notwithstanding the *Aerospatiale* factors, there are clear instances—e.g., lack of jurisdiction over a foreign witness—where the Hague Convention may be the only viable procedure.⁶³ Thus, where a federal court lacks jurisdiction over the witness, proceeding under the Convention is “compulsory.”⁶⁴

⁶⁰ *Id.* at 21 (quoting *Aerospatiale*, 482 U.S. at 546).

⁶¹ *Id.* at 21.

⁶² *Id.* at 22 (citing *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 523 (S.D.N.Y. 1987)).

⁶³ *In re Urethane Antitrust Litig.*, 267 F.R.D. 361, 364 n.12 (D. Kan. 2010) (“Resort to using the procedures of the Hague Convention is particularly appropriate when, as here, a litigant seeks to depose a foreign non-party who is not subject to the court’s jurisdiction.”).

⁶⁴ *Tulip Computers Int’l B.V. v. Dell Computer Corp.*, 254 F. Supp. 2d 469, 474 (D. Del. 2003) (“When discovery is sought from a non-party in a foreign jurisdiction, application of the Hague [Evidence] Convention, which encompasses principles of international comity, is virtually compulsory”) (citing *Aerospatiale*, 482 U.S. at 546).

Apart from the foregoing, the proponent of discovery under the Convention bears the burden of persuasion to obtain discovery.⁶⁵ While not perfunctory, this burden is not prohibitive.⁶⁶ The propounding party may exercise a measure of control over certain factors—tailoring specific discovery requests, demonstrating the relevance of the documents sought to the litigation, and refuting alternative means of obtaining the information. However, other factors—such as whether the information originates outside the United States and the extent to which compliance with the discovery request affects the interests of the United States and the host nation—appear to be largely out of a litigant's control.

The Convention may also be relied upon to *resist* discovery pursuant to the same factors that allow it.⁶⁷ Thus, even where its invocation is mandatory—e.g., discovery is sought from a non-party foreign witness—the foreign witness may properly refuse to respond where the discovery is impermissible under the Convention, such as where a request seeks information that is privileged under the laws of the propounding or host country.⁶⁸ Indeed, there is a body of American jurisprudence dedicated to this issue.

⁶⁵ See *In re Automotive Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 305 (3d Cir. 2004). In denying a request to invoke the Hague Convention, the Third Circuit held that the propounding party had not demonstrated that the Federal Rules of Civil Procedure were inadequate. "We agree first with the District Court's conclusion of law that the appellants bear the burden of persuasion as to the optional use of the Convention procedures . . . '[i]t is more practical, if not logical, to place the burden of persuasion on the proponent of using the Hague Convention'." *Id.* (citing *Rich v. KIS California, Inc.*, 121 F.R.D. 254, 257–58 (M.D.N.C. 1988)).

⁶⁶ The first step in evaluating whether to invoke the Hague Convention is to determine whether or not the subject discovery may be conducted under the Federal Rules. This means that an American litigant must first establish if the host country authorizes a deposition before a person authorized to administer oaths in the place of examination (FED. R. CIV. P. 28(b)(3)), or before a person commissioned by the court (FED. R. CIV. P. 28(b)(4)). If so, it may be unnecessary to resort to the more time consuming and expensive Hague procedures.

⁶⁷ See generally *Aerospatiale*, 482 U.S. at 540 n.25 (finding rule of exclusivity would enable a company which is a citizen of another contracting state to compete with a domestic company on uneven terms); *Soletanche & Rodio, Inc. v. Brown & Lambrecht Earth Movers, Inc.*, 99 F.R.D. 269, 271 (N.D. Ill. 1983) (involuntary plaintiffs and French nationals invoked the French blocking statute to resist a discovery order); see also *In re Aircrash Disaster Near Roselawn*, 172 F.R.D. at 310; *In re Perrier Bottled Water*, 138 F.R.D. at 353.

⁶⁸ See *Perrier*, 138 F.R.D. at 355.

V. The Hague Convention May Limit Intrusive, Burdensome, Privileged, or Otherwise Objectionable Discovery.

The Hague Convention protects a foreign witness from discovery that is intrusive, burdensome, or which seeks privileged or irrelevant information.⁶⁹ A foreign witness may therefore invoke the Convention when presented with discovery that is impermissible under the laws of either the propounding or host nation.⁷⁰ Some American courts have gone so far as to hold that such impermissible discovery impinges upon the “sovereignty” of the host nation, as such discovery could otherwise compel the production of information from a foreign witness that the host nation itself could not require.⁷¹ In such circumstances, an American litigant must either narrow the request or risk having it disallowed.⁷²

A key feature of the Convention—reflected by its emphasis on the primacy of the “internal practices” of the host country⁷³—is that a witness *from whom discovery is sought* receives the breadth of the protection of the laws of the propounding *and* host countries:

This Court agrees with other authorities that a reading of the text of article 27, particularly of the phrase “internal practice,” and of

⁶⁹ *Aerospatiale*, 482 U.S. at 546.

⁷⁰ Of course, if there is no conflict between the rules of an American court and the host nation, both may be enforced. *Compagnie Francaise d'Assurance Pour le Commerce Extérieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 35–36 (S.D.N.Y. 1984) (“The need to respect the sovereignty of a foreign nation transcends the importance of any particular case . . . [w]hen there is a direct conflict, the Court must—as it did in the first part of the opinion—choose which law should govern. *Absent a direct conflict, however, it is the duty of this Court to enforce them both.*”) (emphasis added).

⁷¹ See, e.g., *In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120, 125 (8th Cir. 1986) (finding that requiring discovery that a foreign court had refused under Convention procedures would constitute “the greatest insult” to the sovereignty of that tribunal); *In re Anschuetz & Co., GmbH*, 754 F.2d 602, 613 (5th Cir. 1988)).

⁷² See *Doster v. Schenk*, 141 F.R.D. 50, 55 (M.D.N.C. 1991).

⁷³ Convention on the Taking of Evidence Abroad in Civil or Commercial Matters art. 27, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.A. 231 (“The provisions of the present Convention shall not prevent a Contracting State from - a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2; b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions; c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.”).

its context and legislative history, dictates the conclusion that its aim is *only to authorize more liberal practices that the requested country chooses to utilize* – not those a requesting country might prefer.⁷⁴

As a result, when presented with discovery deemed objectionable, a foreign witness may compel an American litigant to proceed under the Convention. In *Seoul Semiconductor Co. Ltd. v. Nichia Corp.*,⁷⁵ the plaintiff sued its competitors for patent infringement, whereupon the latter issued a letter of request to a foreign government to obtain discovery from its citizen. Citing *Aerospatiale*, the court noted, “a court should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position.”⁷⁶

Applying the test from *Aerospatiale*, the court found that the request for production was not sufficiently narrow, and this weighed against allowing the discovery:

Defendants argue that the interests of France and the United States would be best served by issuing Defendants’ Letter of Request. Defendants suggest that France’s interests in protecting its citizens and corporations from abusive, intrusive, and unduly burdensome discovery are satisfied because the document requests and deposition topics proposed by Defendants are allegedly limited in scope and seek documents and personal knowledge which are clearly identified and referenced during discovery. As discussed above, *the requests are not so narrowly restricted . . . [i]n the absence of a showing of both good cause and a lack of alternatives, this factor weighs against Defendants.*⁷⁷

While the court agreed that an American court had an interest in preventing patent infringement, it held that an American litigant should obtain discovery through less intrusive means:

While the United States has an interest in ensuring that a defendant may have access to critical documents for defendant’s defense, in this case, the Defendants may gain evidence through

⁷⁴ S & S Screw Mach. Co. v. Cosa Corp., 647 F. Supp. 600, 615 (M.D. Tenn. 1986) (emphasis added).

⁷⁵ 590 F. Supp. 2d 832 (E.D. Tex. 2008).

⁷⁶ *Id.* at 834 (quoting *Aerospatiale*, 482 U.S. at 546.)

⁷⁷ *Id.* at 836 (emphasis added).

other means that are *less invasive* to a French citizen, who was evidently employed by, or on behalf of, the French government.⁷⁸

Thus, even where relevant to the issues in the litigation, intrusive discovery may be circumscribed. In *Hudson v. Hermann Pfauter GmbH & Co.*,⁷⁹ the plaintiff brought a product liability action against a German manufacturer and propounded discovery that, while relevant, delved into the defendant's business conduct:

[P]laintiffs served their first set of interrogatories on [the defendant] pursuant to Rule 33 of the Federal Rules of Civil Procedure. This set contains ninety-two interrogatories, many of which contain sub-parts. While it appears that most of these interrogatories seek relevant information, they cannot be described as "unintrusive;" they seek detailed information about . . . the conduct of [defendant's] business affairs with respect to the sale of such machines in the United States.⁸⁰

The defendant objected to the discovery under the Hague Convention, whereupon "plaintiffs indicated that they would not voluntarily comply with [its] terms"⁸¹ Citing *Aerospatiale*, the court limited the discovery, holding that "application of the analytical structure suggested by Justice Blackmun clearly favors the use of Hague Convention procedures in the present case."⁸²

Indeed, discovery upon a foreign witness that is overbroad or seeks information not discoverable in the host country may implicate the judicial sovereignty of the host nation. In *In re Perrier Bottled Water Litigation*⁸³, the plaintiffs filed a product liability and Racketeer Influenced and Corrupt Organizations Act (RICO) action against a French bottled water company, and propounded interrogatories and a request for production. The court noted, "it is obvious that plaintiffs' request seeks an extraordinary volume of information, much of it irrelevant to the cases at hand."⁸⁴ The court continued, "plaintiffs' discovery requests are not narrowly tailored inquiries designed solely to

⁷⁸ *Id.* at 836-37 (emphasis added).

⁷⁹ 117 F.R.D. 33 (N.D.N.Y. 1987).

⁸⁰ *Id.* at 34.

⁸¹ *Id.* at 34-35.

⁸² *Id.* at 40.

⁸³ *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348.

⁸⁴ *Id.* at 354.

target discreet and material information. Rather, although many of the requests seek discoverable information, they call for extremely broad responses from [the defendant], much of which is likely to be *immaterial, and intrusive*.”⁸⁵

The court rejected the plaintiffs’ argument that the Hague Convention was inapplicable, reasoning that discovery upon the foreign litigant necessarily implicated the judicial sovereignty of the host country:

Plaintiffs, however, have missed the point of the Hague Evidence Convention. In this context, *a foreign state’s sovereign interests are implicated*, if at all, in seeking discovery from citizens of the foreign state, within the boundaries of that state, without the permission of that state . . . [t]he act of taking evidence in a common-law country from a willing witness, without compulsion and without a breach of the peace, in aid of a foreign proceeding, is a purely private matter, in which the host country has no interest and in which its judicial authorities have normally no wish to participate. To the contrary, the same act in a civil-law country may be a public matter, and may constitute the performance of a public judicial act by an unauthorized foreign person. It *may violate the “judicial sovereignty” of the host country*, unless its authorities participate or give their consent.⁸⁶

The court granted the “defendants’ motion for a protective order” and ordered “plaintiffs to employ the procedures set forth in the Hague Evidence Convention”⁸⁷

Accordingly, the Hague Convention is not just a vehicle for obtaining discovery from foreign witnesses. Rather, a foreign witness may invoke the Convention to *curb* discovery.⁸⁸ This affords a foreign witness the protection of the discovery laws of its own country. Thus, evidence that is discoverable under the F.R.C.P. may be protected under the Convention.

Again, this promotes comity by affording a foreign witness—of any nation that is a party to the Convention—from whom

⁸⁵ *Id.* at 355 (emphasis added).

⁸⁶ *Id.* (emphasis added) (quoting *Aerospatiale*, 482 U.S. at 557–58 (Blackmun, J., concurring in part)).

⁸⁷ *Id.* at 356.

⁸⁸ See *id.* (granting “defendants’ motion for a protective order” by ordering “plaintiffs to employ the procedures set forth in the Hague Evidence Convention in pursuing any discovery”).

discovery is requested the protection of the applicable laws of not just the propounding nation, but also the laws of the host country with which the witness may be more familiar and which may be more specifically tailored to the witness's interests.⁸⁹ Ultimately, the sovereignty of the host nation is reflected by its judiciary's discretion to determine whether a foreign discovery request is permissible within its jurisdiction.

VI. The Hague Convention Vests a Foreign Tribunal with the Right to Interpret Its Own Laws.

A chief feature of the Hague Convention is to vest the tribunal in the host nation with the right to determine whether a request from a foreign—e.g. American—tribunal complies with the host nation's laws.⁹⁰ This promotes comity by allowing the host nation, which is in a superior position to do so, to determine whether a foreign discovery request complies with the former's rules concerning discovery and evidence.

In *Tulip Computers*,⁹¹ the defendant sought discovery under the Hague Convention from witnesses in the Netherlands, whereupon the plaintiff sought to block the request. The court observed that a foreign witness may refuse to produce evidence contrary to the rules of its own—as well as the propounding—nation. “The person to whom the discovery requests in a Letter of Request are directed has the right to ‘refuse to give evidence’ to the extent that the person has a privilege under the law of the State of execution or the State of origin.”⁹²

The plaintiff argued that the discovery was a broad “fishing expedition” request and objectionable under Article 23:⁹³

In particular, [plaintiff] argues that Article 23 of the Convention prohibits the broad document inquiry sought by [defendant]

⁸⁹ See *id.* at 352-56.

⁹⁰ *Tulip Computers Int'l B.V. v. Dell Computer Corp.*, 254 F. Supp. 2d 469, 472 (D. Del. 2003) (“The signatory state, upon receipt and consideration, ‘shall [then] apply the appropriate measure of compulsion’ as is customary ‘for the execution of orders issued by the authorities of its own country.’”).

⁹¹ *Id.*

⁹² *Id.* at 472.

⁹³ Hague Evidence Convention, *supra* note 21, art. 23 (“A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.”).

because [defendant's] requests do not conform to the Netherlands' reservations with regard to Article 23, which may be characterized as prohibiting American-style discovery "fishing expeditions." In addition, asserts [plaintiff], the Court should deny [defendant's] requests because much of the evidence [defendant] seeks is privileged information. Moreover, maintains [plaintiff], the evidence sought is either irrelevant to the proceedings or constitutes inadmissible hearsay.⁹⁴

In allowing the discovery to proceed under the Convention, the court noted that, if overbroad, a court in the host nation has the power to limit the discovery. For example, "[i]f [defendant's] document requests are overly broad under the law of the Netherlands, as [plaintiff] maintains, then *the requests will presumably be narrowed by the appropriate judicial authorities in the Netherlands* before any documents are produced."⁹⁵

Similarly, the court in *In re Baycol Products*⁹⁶ noted that the terms of the Hague Convention ensure that a court in the host nation reviews the propriety of a foreign discovery request. "The Court agrees that whether the Letter Request will be executed in light of Italy's Article 23 reservation, or whether the Letter Request conflicts with Article 329 of the Italian Code of Criminal Procedure, *require interpretation of Italian law, which is best left to the appropriate Italian tribunal.*"⁹⁷

The principle of comity underlying the Hague Convention is thus exemplified by the right of the host country to determine whether a discovery request from a foreign tribunal complies with the laws of the former.⁹⁸ By virtue of its familiarity with its own laws, a tribunal in the host country is in a superior position to evaluate the propriety of a discovery request. This protection often inures to the benefit of the foreign witness from whom discovery is sought. On the other hand, for the propounding party, this may increase the time and expense of undertaking discovery

⁹⁴ *Tulip Computers*, 254 F. Supp. 2d at 473-74.

⁹⁵ *Id.* at 475 (emphasis added).

⁹⁶ *In re Baycol Prod. Litig.*, 348 F. Supp. 2d 1058.

⁹⁷ *Id.* at 1061 (emphasis added).

⁹⁸ *S & S Screw*, 647 F. Supp. at 616 ("The Court concludes, therefore, that if there is a reasonable likelihood that the Convention will produce the documentary information . . . to the extent that the fundamental principles of the German Law of Procedure are not violated, such requests may be granted considering the justified interests of the persons involved . . .") (emphasis added).

under the Hague Convention. For example, an American litigant seeking discovery from a non-party foreign witness may have to incur the expense of learning the laws and procedures of the host country, and ensuring that its discovery requests comply therewith. Accordingly, depending on the circumstances of a particular case, a litigant must weigh the cost of discovery under the Convention with the benefit of the evidence sought thereunder. These considerations—e.g., cost—may result in choosing to conduct discovery under the F.R.C.P. if it is an available option.

VII. Discovery Under The Federal Rules Vis-à-vis The Hague Convention.

A litigant seeking—or resisting—international discovery must decide whether to proceed under the Federal Rules of Civil Procedure, the Hague Convention, or both.⁹⁹ While a number of factors may be involved, the first—and occasionally dispositive—issue is whether an American court has jurisdiction over the foreign witness from whom discovery is sought.¹⁰⁰ If so, discovery may proceed under either. If not—e.g., a foreign witness is a non-party—discovery typically may only be compelled via the Convention. While an important factor, jurisdiction is not always the end of the analysis, as the cost of discovery under the Convention is often a consideration.

As discussed above, an American litigant who seeks to invoke the Convention has the burden to show that discovery under the F.R.C.P. is not adequate.¹⁰¹ In this regard, Rule 28(b) provides for the deposition of a witness in a foreign state as follows:

- (1) *In General.* A deposition may be taken in a foreign country:
 - (A) under an applicable treaty or convention;
 - (B) under a letter of request, whether or not captioned a “letter rogatory”;
 - (C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination;
- or

⁹⁹ See *id.* at 618 (“Both the Convention and the federal rules would be given effect by an approach that requires litigants seeking foreign discovery to resort to Convention procedures unless their use appeared futile from the outset.”).

¹⁰⁰ See *Work v. Bier*, 106 F.R.D. 45, 49 (D.D.C. 1985) (“[T]he Hague Evidence Convention only applie[s] to evidence located within a foreign country.”).

¹⁰¹ *Pronova BioPharma*, 708 F. Supp. 2d at 452-53; *Strauss*, 249 F.R.D. at 435.

(D) before a person commissioned by the court to administer any necessary oath and take testimony.¹⁰²

Thus, by recognizing a letter of request as a means of conducting discovery, Rule 28(b)(1)(B) acknowledges that discovery may be taken under the Hague Convention *subject to* compliance with the laws of the foreign jurisdiction:

The procedure provided by Rule 28(b)(1) is a reference to the Hague Convention discussed in *Aerospatiale*. Pursuant to Rule 28(b)(2), "[l]etters of request, if honored by a foreign tribunal, provide[] compulsory process abroad." However, "[s]ome countries do not provide compulsory process to summon witnesses, even to execute a letter of request." "Drafters of Rule 28 caution that complying with its terms does not ensure completion of a foreign deposition . . . [i]t is well, however, to realize that compliance with Rule 28(b), even as amended, will not insure completion of a deposition abroad. Examination of the law and policy of the particular foreign country involved, and consultation with the Department of State, is advisable."¹⁰³

With respect to procedure, the Convention provides that each member state is to establish a "Central Authority" responsible for accepting and processing letters of request from other member states.¹⁰⁴ The Central Authority then transmits the request to the appropriate judicial body for a response.¹⁰⁵ Specifically, a letter of request may dictate discovery: (i) under the normal evidentiary rules of the country where the witness is located; (ii) before a diplomatic or consular officer of the country where the action is pending; or (iii) by a commissioner specially appointed by the

¹⁰² See FED. R. CIV. P. 28(b); see also *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1151 (C.D. Cal. 2005) ("Rule 28(b) provides four ways in which a United States court can obtain depositions in a foreign country: (1) pursuant to a treaty or convention; (2) pursuant to a letter of request; (3) on notice before a person authorized to administer oaths in the place where the examination is held; and (4) before a person commissioned by the court.").

¹⁰³ *Mujica*, 381 F. Supp. 2d at 1151 (citations omitted).

¹⁰⁴ See *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 640 (5th Cir. 1994) ("[T]he Hague Evidence Convention indicates that a contracting State must designate a Central Authority for receipt of letters of request. Hague Evidence Convention, art. 2."); see also *Lowrance*, 107 F.R.D. at 387 ("Under the Hague Convention, a party seeking evidence abroad must obtain and send a Letter of Request to the central authority of the country in which the evidence is sought, requesting service of the request on the desired person or entity.").

¹⁰⁵ See *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 510 (N.D. Ill. 1984).

court in which the action is pending.¹⁰⁶

Accordingly, while the F.R.C.P. may be considered the initial option, discovery may proceed under the Hague Convention if the F.R.C.P. is insufficient to obtain evidence abroad. The first step in determining whether discovery is available under the F.R.C.P. is to see if an American court has jurisdiction over a foreign witness;¹⁰⁷ if so, the propounding party should, at least initially, consider obtaining discovery under the F.R.C.P.¹⁰⁸

However, the fact that an American court may have jurisdiction over a foreign witness does not necessarily dispense with the Hague Convention.¹⁰⁹ This may occur where a foreign witness wishes to apply the potentially narrower discovery laws of the host nation to *curtail* discovery otherwise available under the F.R.C.P.

Apart from the issue of jurisdiction, other factors weigh into the use of the Hague Convention on a case-by-case basis.¹¹⁰ Notwithstanding an American court's jurisdiction over a witness, the cost and potential delay in conducting discovery under the Convention may favor proceeding under the F.R.C.P.¹¹¹ Since the standard methods (e.g., depositions, requests for production, etc.) are available under the F.R.C.P., the costs of propounding international discovery thereunder should be somewhat comparable to domestic litigation and, in any event, less than the

¹⁰⁶ See *Pronova*, 708 F. Supp. 2d at 452 n.3; *Tulip Computers*, 254 F. Supp. 2d at 472.

¹⁰⁷ See *Work* 106 F.R.D. at 50-51 (“[H]armony can be achieved between the Hague Evidence Convention and the applicable provisions of the Federal Rules of Civil Procedure where a federal court has *in personam* jurisdiction over a foreign corporation or individual.”).

¹⁰⁸ See *Lechoslaw v. Bank of America, N.A.*, 618 F.3d 49, 57 (1st Cir. 2010) (“The Federal Rules of Civil Procedure provide that depositions may be taken in a foreign country pursuant to any applicable treaty or convention.”).

¹⁰⁹ See *S & S Screw Mach. Co.*, 647 F. Supp. at 614 (“[A] party’s duty to produce evidence may be subject both to the Convention and to the Federal Rules of Civil Procedure. The mere entry onto the scene of the Federal Rules, however, does not make the Convention *inapplicable* to parties.”).

¹¹⁰ *Estate of Klieman*, 272 F.R.D. at 256 (“Whether courts resort to the Convention procedures or the Federal Rules depends upon the facts of each case, ‘sovereign interests, and the likelihood that resort to those procedures will prove effective.’”).

¹¹¹ See *Int’l Soc’y for Krishna Consciousness, Inc.*, 105 F.R.D. at 450 (“[A] number of courts have observed that the Hague Convention . . . is quite slow and costly even when the foreign government agrees to cooperate.”).

costs associated with proceeding under the Convention.

Of course, the F.R.C.P. presumes jurisdiction over a foreign witness.¹¹² While it remains an effective mechanism regarding parties and party-affiliated witnesses, the F.R.C.P. is inapplicable where an American court does not have jurisdiction over a witness. A litigant's invocation of the Hague Convention is therefore bolstered if a deposition is unavailable under Rule 28(b)(3) or (4), as this would tend to show that alternative methods do not exist. In such instances, discovery may have to proceed under the Convention.¹¹³

VIII. A Foreign Litigant May Obtain Evidence From An American Witness Under 28 U.S.C. §1782.

As an alternative to the Hague Convention, a foreign litigant may pursue discovery from an American witness under 28 U.S.C. §1782. Section 1782 provides that a litigant in a "proceeding" in a foreign jurisdiction may obtain discovery by petitioning the federal district court wherein an American witness resides.¹¹⁴ Indeed, since the right to discovery is often broader thereunder—i.e., discovery under section 1782 is not limited by whether the information sought is either admissible or discoverable in the foreign proceeding—foreign litigants increasingly rely on section 1782 vis-à-vis the Convention.¹¹⁵

Section 1782 allows a foreign litigant, through a letter of request, to ask a United States district court to issue an appointment to take testimony and obtain documents from an American witness:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order

¹¹² See 28 U.S.C. § 1332 (2013).

¹¹³ See *S & S Screw Mach. Co.*, 647 F. Supp. at 614 ("[B]ecause United States courts lack sovereign power to compel compliance by non-parties abroad, the Convention perforce becomes the exclusive means to gather evidence from those persons.").

¹¹⁴ 28 U.S.C. § 1782 (2013).

¹¹⁵ Compare 28 U.S.C. § 1782 (2013), with *supra* notes 99-113 and accompanying text.

may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.¹¹⁶

In its seminal decision, *Intel Corp. v. Advanced Micro Devices, Inc.*, the United States Supreme Court noted, “[s]ection 1782 is the product of congressional efforts, over the span of nearly 150 years, to provide federal-court assistance in gathering evidence for use in foreign tribunals.”¹¹⁷

Section 1782 is meant to both facilitate fact-finding in international litigation and offer the United States’ judicial system as an example for other countries to follow:

The goals of the statute, which dates back to 1855, are to provide “equitable and efficacious” discovery procedures in United States courts “for the benefit of tribunals and litigants involved in litigation with international aspects,” and to “encourage foreign countries by example to provide similar means of assistance to our courts.” In pursuit of these twin goals, the section has, over the years, been given “increasingly broad applicability.”¹¹⁸

¹¹⁶ 28 U.S.C. § 1782(a) (2013).

¹¹⁷ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004).

¹¹⁸ *Lancaster Factoring Co. Ltd. v. Mangone*, 90 F.3d 38, 41 (2d Cir. 1996) (citations omitted); see also *In re Chevron Corp.*, 749 F. Supp. 2d 141, 160 (S.D.N.Y. 2010) (“[D]istrict courts must exercise their discretion under Section 1782 in light of the twin aims of the statute: ‘providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by

In this regard, a foreign litigant may proceed under section 1782, the Hague Convention, or both.¹¹⁹ Indeed, a foreign litigant is often deemed to have broader discovery rights under section 1782 than under the Convention.¹²⁰ This is because discovery under section 1782 is not limited by whether the requested information is admissible¹²¹ or even discoverable¹²² in the foreign jurisdiction from which the request emanates. In other words, a foreign litigant may be able to obtain information from an American witness under section 1782 that would not be discoverable in the foreign jurisdiction from which the request propounded. A further reason to proceed under section 1782 is that a United States district court does not normally inquire into the foreign tribunal's subject matter jurisdiction.¹²³ Thus, section 1782 may yield discovery otherwise beyond the issues raised in

example to provide similar means of assistance to our courts.”) (quoting *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 84 (2d Cir. 2004)).

¹¹⁹ See *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Kozeny*, 115 F. Supp. 2d 1243, 1249 (D. Colo. 2000) (“Defendants may still seek documents and testimony from U.S. witnesses under the Hague Convention or under 28 U.S.C. § 1782, which provides for production of documents and taking testimony in aid of foreign litigation.”); see also *Proyectos Orchimex de Costa Rica, S.A. v. E.I. du Pont de Nemours & Co.*, 896 F. Supp. 1197, 1202-203 (M.D. Fla. 1995) (“[P]laintiffs would nevertheless be able to obtain documents from third parties located in the United States under 28 U.S.C. § 1782 as well as through other extra-territorial means such as the Hague Convention.”).

¹²⁰ See *In re Letter of Request From Boras Dist. Ct.*, 153 F.R.D. 31, 35 (E.D.N.Y. 1994) (“Petitioner’s compliance with the terms of section 1782 and the Hague Convention does not necessarily end this inquiry since this court must determine whether it is appropriate to exercise the wide discretion conferred by section 1782.”).

¹²¹ See *In re Letters Rogatory from Tokyo Dist., Tokyo, Japan*, 539 F.2d 1216, 1219 (9th Cir. 1976) (“Nor can the witnesses object to the district court’s action on the ground that the testimony to be taken may not be admissible in a [foreign] trial. Such evidence may still be acceptable for preliminary stages in the [foreign nation’s] procedure just as American grand juries can consider evidence not admissible in a trial.”).

¹²² See *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 82 (2d Cir. 2012) (“[A]s a district court should not consider the *discoverability* of the evidence in the foreign proceeding, it should not consider the *admissibility* of evidence in the foreign proceeding in ruling on a section 1782 application.”) (emphasis added); see also *Application of Aldunate*, 3 F.3d 54, 57 (2d Cir. 1993) (“[S]ection 1782 does not require the district court to make a finding of discoverability under the laws of the foreign jurisdiction.”).

¹²³ See *In re Request For Judicial Assistance from Seoul Dist. Crim. Ct., Seoul, S. Kor.*, 555 F.2d 720, 723 (9th Cir. 1977) (“In our judgment our federal courts, in responding to requests, should not feel obliged to involve themselves in technical questions of foreign law relating to subject-matter jurisdiction of foreign or international tribunals.”).

the foreign proceeding.

In order to obtain discovery under section 1782, a litigant in a proceeding abroad must make a good faith showing of a non-intrusive need for the information, and that the request does not circumvent discovery restrictions:

The Supreme Court has identified four discretionary factors to guide the Court's determination whether to grant a Section 1782 application: (1) whether the material sought is within the foreign tribunal's jurisdictional reach and thus accessible absent Section 1782 aid; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court jurisdictional assistance; (3) whether the Section 1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) whether the subpoena contains unduly intrusive or burdensome requests.¹²⁴

Notably, the diplomatic relationship between the United States and the nation from which the discovery is propounded may affect whether a district court allows the discovery:

The language of § 1782 itself does not provide specific guidance to district courts in exercising such discretion. The accompanying legislative history, however, does articulate several factors that district courts may consider in deciding whether to grant assistance under the statute: "[T]he court may take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country."¹²⁵

In this regard, a district court may decline a discovery request from a foreign tribunal with characteristics inconsistent with American principles of fairness:

A refusal to grant assistance under Section 1782 may also be based on the district court's finding that, in some way, the foreign proceedings are unfair or incompatible with domestic

¹²⁴ *In re Chevron Corp.*, 749 F. Supp. 2d at 160; *see also In re Godfrey*, 526 F. Supp. 2d 417, 419 (S.D.N.Y. 2007) (citing *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004)).

¹²⁵ *U.S. v. Sealed 1*, Letter of Request for Legal Assistance from the Deputy Prosecutor General of the Russ. Fed'n, 235 F.3d 1200, 1206 (9th Cir. 2000) (quoting S.Rep. No. 88-1580, 88th Cong., 2d Sess. (1963), reprinted in 1964 U.S.C.C.A.N. 3782, 3788).

notions of propriety. But caution in that regard is warranted, because American courts should not condemn foreign proceedings merely because they are different from those conducted in, or unknown to, American Courts.¹²⁶

Nevertheless, in most instances, a litigant in a foreign proceeding will find it easier to obtain discovery from an American witness under section 1782 than an American litigant from a foreign witness under the Hague Convention. Under section 1782, a foreign litigant is not burdened by whether the evidence sought is admissible or discoverable in the foreign tribunal.¹²⁷ Rather, the foreign litigant need only show that the evidence cannot be obtained without section 1782, is from a "receptive" foreign nation, does not circumvent discovery rules (e.g., privileges), and is not intrusive.¹²⁸ While it may seem inequitable to afford foreign litigants broader discovery in the United States than American litigants have in foreign jurisdictions, one of the goals underlying section 1782 is to promote greater discovery rights abroad by using the example set in America.¹²⁹

IX. Conclusion

The theme of comity underlying the Hague Convention is manifested by the discovery requests propounded thereunder. From the perspective of an American litigant, the initial expression of comity is that the Hague Convention is an alternative procedure and the burden is on the proponent of discovery to demonstrate that the F.R.C.P. is inadequate. Where an American tribunal has jurisdiction over a foreign witness (e.g., the witness is a party or party-affiliate), it may be unnecessary—and perhaps even unwise,

¹²⁶ *Id.* (quoting Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT'L L. & COM. 1 (1998)); see also *In re Request For Judicial Assistance*, 555 F.2d at 724 ("This is not to say that jurisdiction of the requesting court is never an appropriate inquiry. If departures from our concepts of fundamental due process and fairness are involved, a different question is presented – one that is not presented here and which we do not reach.").

¹²⁷ 28 U.S.C. § 1782 (2013).

¹²⁸ See *In re Chevron Corp.*, 749 F.Supp.2d at 160; see also *In re Godfrey*, 526 F. Supp. 2d 417, 419 (S.D.N.Y. 2007) (citing *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004)).

¹²⁹ See generally *Intel Corp.*, 542 U.S. at 247 (arguing that Congress repeatedly broadened the scope of § 1782 in light of the increasing demands of international commerce).

given the attendant cost and delay—to proceed under the Convention. Rather, where an American court has jurisdiction over a foreign witness, that person may be deposed under Rule 28(b).

However, where an American court does not have jurisdiction over a witness (e.g., non-party foreigner), discovery may have to proceed under the Hague Convention. In these circumstances, an American litigant should ensure that the discovery complies with the factors set forth in *Aerospatiale* by propounding specific requests seeking evidence that is demonstrably important to the litigation.

Another significant expression of comity under the Hague Convention is where a foreign witness resists discovery under the laws of its own nation. Accordingly, that discovery may be permissible in the propounding jurisdiction—e.g., the United States—does not preclude a foreign witness from relying on the more restrictive laws of the host nation to decline discovery that is impermissible there. In such circumstances, comity is further effectuated by vesting a tribunal in the host nation with the right to determine whether discovery propounded from a foreign nation complies with the former's laws.

In short, depending on the situation, the Hague Convention may be used as “sword” or a “shield.” It is the former where an American court does not have jurisdiction over a foreign witness and discovery may only proceed under the Convention, and it is the latter where a foreign witness relies on the discovery laws of its own nation to limit a discovery response.

For these reasons, the Hague Convention is not a predictable—much less perfect—channel for conducting discovery. Perhaps the most prominent expression of comity under the Convention is that it is not a one-size-fits-all means of discovery, but rather proceeds on a case-by-case basis and often produces inefficient and less than ideal results. These compromises reflect the principle that, in crafting the Convention, the member nations sought to make paramount the interests of the nation from whose residents discovery is sought.

